Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL LEAHY, et al.,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PERRY M. BERKE
Counsel of Record
BURTON I. WEINSTEIN
Baskin, Server, Berke,
Weinstein & Spiro
20 N. Wacker Drive
Suite 1900
Chicago, Illinois 60606
(312) 346-8090

SUSAN P. MALONE
20 N. Wacker Drive
Suite 1900
Chicago, Illinois 60606
(312) 726-2638

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTION PRESENTED

Do employees have a right to a determination of whether a meal period portion of an 8½ hour work shift is compensable under the Fair Labor Standard Act (FLSA) or is a standard overtime pay provision in a collective bargaining agreement dispositive of such right as a matter of law.

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PETITION FOR WRIT OF CERTIORARI

Daniel Leahy, and over 7,000 Chicago Police Officers[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (referred to herein as "Leahy Appeal II") appears at Appendix A to the petition and is reported at 96 F.3d 228 (1996).

The second opinion of the district court (referred to herein as "Leahy II") appears at Appendix B to the petition and does not appear to have been officially reported.

The first opinion of the Court of Appeals (referred to herein as "Leahy Appeal I") appears at Appendix C and is reported at 994 F.2d 333 (1993).

The first opinion of the district court (referred to herein as "Leahy I") appears at Appendix D to the petition and is reported at 785 F.Supp. 726 (N.D. Ill. 1992).

JURISDICTION

The Court of Appeals entered its judgment and order on September 11, 1996. Plaintiffs' Petition For Rehearing With Suggestion For Rehearing en Banc was denied on November 7, 1996. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

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[1] The names of the over 7,000 individual petitioners are set forth in Appendix F.

STATUTORY PROVISION INVOLVED

Section 7(a) of the Fair Labor Standards Act, 29 U.S.C. Section 207(a), provides, in pertinent part, that covered employees shall not be required to work hours in excess of the statutory maximum without payment of compensation at an overtime rate established by law. The text of the section, and other relevant sections as well as the principal regulation relating thereto are set forth at Appendix E.

STATEMENT

Daniel Leahy and twenty three other Chicago police officers initiated this case, claiming that the 30 minute meal period included in their 8½ hour tour of duty is compensable time under the FLSA. More than 7,000 Chicago police officers agreed and "opted in" to these consolidated cases. The officers contend that the multitude of restrictions imposed on them by the written rules and regulations of the police department, including the requirement that they be in uniform during meals with their radios on and with them, benefits the City by having a police presence in the community and a constant "ready force" available as needed. The officers further contend that the inability to always obtain a meal period, the frequent interruptions of meal periods for various duty reasons and for various periods of time, the absence of any established procedure for scheduling meal periods or obtaining compensation for lost or interrupted meal periods, and the policy of the department to discourage and view with disfavor applications for overtime pay related to the 30 minute meal period, are all circumstances creating a fact question as to the compensability of the 30 minute meal period under the FLSA.

In *Leahy Appeal I*, the court found that the collective bargaining agreement between the union and the City was not controlling of the FLSA issue, and chose to follow the rule announced by the 10th Circuit Court of Appeals in *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992), which held that the controlling fact issue as to compensability is whether the 30 minute meal period is spent "predominantly for the benefit of the employer". In *Leahy Appeal II*, the court affirmed the district court's order granting summary judgment for the defendant City albeit on grounds other than those raised in the motion or relied upon by the district court, holding that the overtime pay provision of the collective bargaining agreement between the union and the City was dispositive of any FLSA rights the officers claimed to have with respect to the 30 minute meal period, as a matter of law.

PROCEEDINGS BELOW

A. Leahy Appeal I

In *Leahy I*, the district court granted defendant's motion for judgment on the pleadings. The court of appeals reversed. The majority opinion rejected defendant's contention that an agreement between the City and the Fraternal Order of Police (FOP) was dispositive of plaintiffs' claim.[2] The case was remanded for further factual

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[2] The court said:

> . . . Although a fact finder might consider (a collective bargaining agreement) as one among many factors in determining whether the officers were completely relieved of duty, it certainly does not outright preclude the officers' claim. 994 F.2d 339, n.11; Appendix C-13, n.11.

development. Judge Barbara Crabb, sitting by designation, concurred in the determination that judgment on the pleadings was error, and stated:

> The frequency of interruptions during meal periods may operate to impose a state of readiness so like that of actual patrol work as to warrant compensation during *all* meal periods. Such a state of readiness may result from the frequency of dispatcher-initiated calls, or again, departmental regulations may so constrain an officer's choice of location and activities during meal periods as to require in effect that the officer perform services commensurate with those of an officer who walks a beat. In either case, officers would not be 'completely relieved from duty' within the meaning of the FLSA.

994 F.2d at 340; Appendix C-16.

Judge Bauer dissented, contending that the collective bargaining agreement was controlling and satisfied FLSA scrutiny as a matter of law. Judge Bauer stated "There is no need for further factual development of the officers' case" and the docket should not be "cluttered with their case when the officers' complaints are doomed". 994 F.2d at 345; Appendix C-25.

B. Leahy Appeal II

After remand, the City filed a motion for summary judgment based, not on the merits of the case, but on two affirmative defenses – (1) that the collective bargaining agreement constituted an express agreement that the 30 minute meal period ought not be compensable working time for the purposes of the FLSA and (2) that 29 U.S.C. Section 259(a) (the Portal Act) operates as a total bar to the plaintiffs' action. Discovery was then conducted solely

on the two issues raised. Plaintiffs' brief in opposition dealt only with the issues raised in the motion and not with the ultimate merits of the case.

The district court rejected both of the affirmative defenses raised in defendant's motion. It found that the collective bargaining agreement "fails to include any agreement regarding meal periods." (Appendix B-11) The district court then, without notice that it intended to use defendant's limited motion for summary judgment as a vehicle for deciding the ultimate issue of the case, entered summary judgment for the defendant on the merits.[3]

Defendant, in its *Leahy Appeal II* brief, raised only the issue of the collective bargaining agreement. The issue, however, was revised. Instead of contending that there was an express agreement between the City and the FOP excluding the 30 minute meal period from working time for FLSA purposes (which theory was rejected by the *Leahy Appeal I* opinion and *Leahy II*), the City now embraced the rationale of Judge Bauer's dissent in *Leahy Appeal I* that the provision in the collective bargaining agreement for compensating officers at overtime rates whenever they worked in excess of eight hours a day was dispositive of their claim that the 30 minute meal period was compensable under the FLSA.

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[3] The district court's ruling was, in effect, the same as its earlier ruling which was reversed in *Leahy Appeal I*, because discovery on the merits was incomplete. While the district court prefaced its grant of summary judgment with the statement "Discovery is complete", the defendant conceded that was not so. 96 F.3d at 231; Appendix A-4.

With the replacement of Judge Crabb, Judge Bauer, the dissenter in *Leahy Appeal I*, was able, in *Leahy Appeal II*, to make his dissent prophecy come to pass, despite the doctrine of the "law of the case". In total disregard of the earlier majority opinion on the very same issue, Judge Bauer, on behalf of a bitterly divided court, found the fact that the collective bargaining agreement between the City and the FOP provided that officers could receive overtime pay for hours worked in excess of eight per day, precluded compensability for the 30 minute meal period under the FLSA as a matter of law.

Judge Cudahy, who wrote for the majority in *Leahy Appeal I*, was now the dissenter in *Leahy Appeal II*, expressing this concern:

> . . . The case and the issue to be resolved have not changed in any respect, but the panel has changed. And this is decisive. As a result the law seems to have changed without so much as a nod of recognition by the new majority to the law of the case doctrine, which has been flagrantly violated here. This in itself is more than enough to compel rejection of the (new) majority opinion. 96 F.3d at 232; Appendix A-8.

REASONS FOR GRANTING THE PETITION

The decision in *Leahy Appeal II* is in direct conflict with earlier decisions of this Court, conflicts with the decision of the Tenth Circuit Court of Appeals which was relied upon by the earlier panel decision in *Leahy Appeal I*, and totally ignores the doctrine of the law of the case as established by the same court in *Leahy Appeal I*. Moreover, the decision below is erroneous, and the issue that it addresses is of widespread importance.

A. The Court of Appeals' Decision Ignores And Conflicts With Earlier Decision Of This Court.

The ruling of the Court of Appeals is directly in conflict with the decision of this Court in *Barrentine v. Arkansas Freight*, 450 U.S. 728 (1981). In *Barrentine*, employees claimed that certain time was working time under their bargaining agreement and under the FLSA. The collective bargaining claim was taken to arbitration and the union and its members lost. They then brought suit under the FLSA. The employer claimed that the fact that the time in controversy had been found in arbitration not to be working time under the collective bargaining agreement meant that it could not be working time for FLSA purposes. This Court disagreed, finding that the fact the employees "lost" under the collective bargaining agreement did not mean they had "lost" under the FLSA:

> In sum, the FLSA rights petitioners seek to assert in this action are independent of the collective bargaining process. They devolve on the petitioners as individual workers—not as members of a collective organization. They are not waiveable. 450 U.S. at 345.

The majority opinion in *Leahy Appeal II* is not only in conflict with *Barrentine*, but it appears the majority did not even attempt to distinguish that case. *Barrentine* is not mentioned anywhere in the opinion.

The majority opinion did not engage in any independent scrutiny of the circumstances surrounding the 30 minute meal period to determine whether such time was compensable under the Act. The test of compensability has been described by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 124 (1944) as follows:

> Whether in a concrete case such time ("on call" or "sleep" time beyond the 8½ hour work day) falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court . . . . This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, *consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances.* (emphasis supplied)

323 U.S. at 135.

In *Leahy II*, the district court found that the collective bargaining agreement "failed to include any agreement regarding the meal periods." (Appendix B-11) The record contains no credible evidence that the City ever considered the effect of the FLSA requirements on the 30 minute meal period in negotiating with the FOP. That finding of the district court was not challenged or even referred to in the City's brief to the Court of Appeals nor was it challenged or referred to in that court's opinion. Thus, the petitioners' contention is not undermined by the "scrutiny and construction of the agreement" element referred to in *Skidmore*.

It should be made clear that the test for determining whether time is compensable under the FLSA, as described in *Skidmore* and *Barrentine*, is a threshold factual issue to be addressed in cases such as those involving "sleep time", "on call" and police officers' meal period portion of their tour of duty (which is akin in certain respects to an "on call" case). These cases involve a wide variety of restrictions in time, location, activity and employer policies, along with a variety of relevant surrounding circumstances. Some combinations of facts may bring the time to the level of compensability—others

may not. Only when the "time" has been determined to be non-compensable under the FLSA, do the overtime pay provisions of a collective bargaining agreement come into play. If the "time" is compensable, it is all compensable. If it is not compensable, then only that portion of the time actually worked is compensable as overtime.

Despite years of litigation and two appeals, the threshold factual issue has never been properly addressed in this case. The court in *Leahy Appeal I* remanded the case so that the facts could be developed through discovery preliminary to a factual determination of whether the 30 minute meal period was predominantly for the benefit of the employer. The district court in *Leahy II* entered summary judgment for the City on the merits, when the issue was not briefed or argued and discovery was incomplete, and without any hint of its intention to consider the ultimate issue. The majority in *Leahy Appeal II* was fully aware that the district court's ruling on the merits was erroneous, when it stated:

> The plaintiffs argue that the district court improperly granted summary judgment on the merits because discovery was not complete on the issue of the frequency and duration of interruptions during officers' meal periods. *The City concedes this, and therefore does not defend the district court's reasoning.*[4] (emphasis added) 96 F.3d at 231; Appendix A-4.

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[4] Plaintiffs' *Leahy Appeal II* reply brief described the discovery remaining as follows:

> The fact is that discovery was incomplete on all aspects of the controlling issue in the case, including the non-payment for interrupted or missed meal periods, the inability to make up for missed or interrupted meal periods, the

(continued...)

Thus, the majority opinion in *Leahy Appeal II* conflicts with this Court's decisions in *Barrentine* and *Skidmore*, bypasses the threshold factual issue of whether the officers' 30 minute meal period is compensable work time under the FLSA, and ignores the law of the case as established by an earlier panel of the same court.

B. The Court of Appeals' Decision Conflicts With The Tenth Circuit Court of Appeals.

The Tenth Circuit's ruling in *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992) is in direct conflict with the case at bar. *Lamon*, like this case, involved the meal period of police officers and its compensability under the FLSA. The *Lamon* court held that the controlling fact issue as to compensability is whether the meal period is spent "predominantly for the benefit of the

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[4] (...continued)

> actual effect of other departmental restrictions on meal periods, the pressures exerted by supervisors to discourage officers from making overtime claims and the practical ineffectiveness or inapplicability of the grievance process with respect to overtime claims for interrupted meal periods.

Prior to the filing of the motion for summary judgment the parties had filed a Joint Status Report advising the court that they had devised "a coordinated plan for completion of discovery". The court granted the parties joint motion to extend discovery, but did not pass on the parties coordinated plan for completion of discovery, did not set any discovery schedule and did not enter any order closing discovery. The discovery in the "coordinated plan" on the ultimate issue was not conducted because of the intercession of defendant's motion for summary judgment on narrow, affirmative defense issues.

employer,"—the threshold factual issue. Importantly, *Lamon* also involved a collective bargaining agreement which provided for overtime pay for hours worked in excess of 40 per week. Such provision had no applicability, however, because the threshold factual issue was not yet determined.

The *Leahy Appeal I* Court considered *Lamon* to be most instructive and quite comparable to the instant case, and adopted the "predominant benefit" rule as the rationale for its decision reversing the judgment on the pleadings.[5] The majority in *Leahy Appeal II* failed to follow the *Lamon* test and establishes the overtime provisions of a collective bargaining agreement as the litmus test for avoiding FLSA scrutiny, even though the collective bargaining agreement is silent on the FLSA issue! Judge Cudahy, in his dissent, characterizes the majority's holding as follows:

> Indeed, the assertion that merely by providing for overtime pay in its collective bargaining agreement an employer may insulate itself from FLSA scrutiny borders on the preposterous. Yet the majority's opinion essentially boils down to just such an assertion.

The *Leahy Appeal II* majority cites no case where it has ever been held that the mere existence of a general overtime provision in a collective bargaining agreement forecloses any claimed FLSA rights of workers.

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[5] The *Leahy Appeal I* Court also relied upon *Wahl v. City of Wichita*, 725 F.Supp. 1133 (D. Kan. 1989), complimenting the *Wahl* court on its "comprehensive analysis of the mealtime compensability issue." 994 F.2d 338; Appendix C-10.

C. The Question Presented Is Important.

The issue presented is purely a question of law. Are the compensation rights of employees under the FLSA satisfied, as a matter of law, by a standard overtime pay provision in a collective bargaining agreement? The decision below affects not only the plaintiff police officers, but is authority for substituting overtime pay provisions in labor agreements for FLSA scrutiny in all employment situations, municipal or otherwise, previously subject to the FLSA. In so ruling, the decision below conflicts with this Court's decision in the *Barrentine* case and may nullify *Barrentine* in the Seventh Circuit. The ripple effect of this clearly erroneous opinion is sure to be felt throughout the country.

Modern day labor agreements uniformly contain the kind of overtime pay provision which the *Leahy Appeal II* majority has concluded is controlling. Employers involved in FLSA controversies or litigation concerning the "compensability" issue throughout the country can be expected to rely upon the *Leahy Appeal II* decision as authority for eliminating consideration of the threshold factual determination of compensability. Employees, on the other hand, will look to *Lamon* and the concept that the threshold factual question determines "compensability" and not the overtime pay provisions of the labor agreement.

CONCLUSION

It may be expected that the decision below, if allowed to stand, will have a far-reaching, though erroneous effect on collective bargaining negotiations and on district courts and courts of appeal throughout the country. The law should be clarified before the *Leahy Appeal II* progeny develops. This unsupported challenge to *Barrentine* and disregard of the law of the case established in *Leahy Appeal I* should be reversed. Therefore, the Court should grant the petition.

Respectfully submitted,

PERRY M. BERKE
Counsel of Record
BURTON I. WEINSTEIN
Baskin, Server, Berke,
Weinstein & Spiro
20 N. Wacker Drive
Suite 1900
Chicago, Illinois 60606
(312) 346-8090

SUSAN P. MALONE
20 N. Wacker Drive
Suite 1900
Chicago, Illinois 60606
(312) 726-2638

Attorneys for Petitioners